

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:15-CR-220 JCM (VCF)

Plaintiff(s),

ORDER

v.

LEON JOHNSON,

Defendant(s).

Presently before the court are Magistrate Judge Ferenbach's report and recommendations regarding defendant's motion to dismiss. (ECF. No. 33). Defendant Leon Johnson filed an objection (ECF. No. 40), and the government filed a response to defendant's objection. (ECF. No. 44).

**I. Background**

On July 28, 2015, a federal grand jury issued an indictment charging defendant in counts one and three with interference with commerce by robbery, in violation of 18 U.S.C. § 1951, and in counts two and four with use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). (ECF. No. 17).

Defendant filed a motion to dismiss counts two and four of the indictment. (ECF. No. 26). Magistrate Judge Ferenbach issued a report and recommendation recommending that the defendant's motion to dismiss be denied. Defendant filed an objection to the report and recommendation. (ECF. No. 40). The court now reviews Magistrate Judge Ferenbach's recommendation.

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## 1      **II.      Legal Standard**

2            This court “may accept, reject, or modify, in whole or in part, the findings or  
3      recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). Where a party timely objects  
4      to a magistrate judge’s report and recommendation, then the court is required to “make a de novo  
5      determination of those portions of the [report and recommendation] to which objection is made.”  
6      28 U.S.C. § 636(b)(1). Where a party fails to object, however, the court is not required to conduct  
7      “any review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S.  
8      140, 149 (1985).

## 9      **III.      Discussion**

10           Defendant’s motion to dismiss argues that the Hobbs Act robbery offenses charged in  
11      counts one and three underlying the § 924(c) offense, counts two and four, categorically fail to  
12      qualify as a crime of violence within the meaning of 18 U.S.C. § 924(c)(3)(A), and the residual  
13      clause of § 924(c)(3)(B) is unconstitutionally vague under *Johnson v. United States*, \_\_ U.S. \_\_,  
14      135 S. Ct. 2551 (2015).

15           In his report and recommendation, Magistrate Judge Ferenbach found that 1) the indictment  
16      was facially valid because Hobbs Act robbery is a crime of violence under the “elements” clause  
17      of 18 U.S.C. § 924(c)(3)(A); 2) the categorical approach suggested by the defendant should not be  
18      applied at this procedural posture to challenge the sufficiency of the facially-valid indictment; 3)  
19      even if the court were to apply a categorical analysis, it would apply the “modified categorical  
20      approach” and still determine that Hobbs Act robbery qualifies as a crime of violence under the  
21      “elements clause” of 18 U.S.C. § 924(c) because it “necessarily involves the use, attempted use,  
22      or threatened use of physical force against the person or property of another”; and 4) the court need  
23      not reach the defendant’s constitutional argument about the vagueness of 18 U.S.C. § 924(c)’s  
24      “residual clause.” Consequently, Magistrate Judge Ferenbach recommends that the defendant’s  
25      motion to dismiss should be denied. (ECF. No. 33). The government concurs with the magistrate  
26      judge’s report and recommendation and asks that this court adopt it in full. (ECF. No. 44).

27           Defendant’s objections restate the same arguments made in his underlying motion to  
28      dismiss. Defendant argues 1) whether Hobbs Act Robbery is a “crime of violence” is a matter of

1 law determined by the court; 2) Hobbs Act robbery fails to qualify as a “crime of violence” under  
 2 the § 924(c) force clause; and 3) § 924(c) (3)’s residual clause is unconstitutionally vague.

3 First, both parties request clarification regarding the magistrate judge’s statement that  
 4 “[t]he jury may . . . conclude that Mr. Johnson did not commit a crime of violence.” (ECF. No.  
 5 33). Current Ninth Circuit law states that, while “[t]he jury must find the facts underlying the  
 6 charged offense . . . in this case[,] the court determines whether that category of offense is a crime  
 7 of violence.” *United States v. Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995). While the magistrate  
 8 judge noted the distinctions between the procedural posture in *Amparo* and the posture of the  
 9 instant case, Ninth Circuit law currently requires that the district court, rather than the jury, must  
 10 determine whether the predicate offence underlying the 924(c) charge meets the statutory  
 11 definition of a “crime of violence.” The magistrate judge correctly made that determination in his  
 12 report and recommendation.

13 Second, the court agrees with Magistrate Judge Ferenbach’s determination that Hobbs Act  
 14 robbery qualifies as a “crime of violence” under 18 U.S.C. § 924(c)(3)’s elements clause, which  
 15 defines a crime of violence as “the use, attempted use, or threatened use of physical force against  
 16 the person or property of another.” 18 U.S.C. § 924(c)(3)(A). (ECF. No. 33). This court previously  
 17 considered similar arguments in *United States v. Jaime Sandoval*, 2:15-cr-159-JCM-NJK (D.  
 18 Nev. Feb. 17, 2016) (citation omitted). The court finds these arguments unpersuasive, including  
 19 the claim that Hobbs Act robbery fails to qualify as a crime of violence because it may be  
 20 accomplished by placing someone in fear of injury to his intangible property. (ECF. No. 40).  
 21 Hobbs Act robbery is defined as:

22 The term “robbery” means the unlawful taking or obtaining of personal property  
 23 from the person or in the presence of another, against his will, by means of actual  
 24 or threatened force, or violence, or fear of injury, immediate or future, to his person  
 25 or property, or property in his custody or possession, or the person or property of a  
 26 relative or member of his family or of anyone in his company at the time of the  
 taking or obtaining. 18 U.S.C. § 1951(b)(1). This statute obviously “has as an  
 element the use, attempted use, or threatened use of physical force against the  
 person or property of another,” and therefore qualifies as a “crime of violence”  
 under Section 924(c)(3)(A).

1 This statute contains “as an element the use, attempted use, or threatened use of physical force  
2 against the person or property of another,” and therefore qualifies as a “crime of violence” under  
3 Section 924(c)(3)(A).

4 Magistrate Judge Ferenbach noted that other courts have reached the same conclusion.  
5 *United States v. Standberry*, No. 15–cr–102-HEH, 2015 WL 5920008, at \*5 (E.D. Va. Oct. 9,  
6 2015) (“This Court will therefore join other courts in finding that Hobbs Act robbery contains as  
7 one of its elements the actual, attempted, or threatened use of physical force against the person or  
8 property of another, thereby constituting a crime of violence under § 924(c)(3)(A).” (citing *United*  
9 *States v. Welton*, 387 Fed. Appx 189, 191 (3d Cir. 2010) (per curiam); *United States v. Morris*,  
10 247 F.3d 1080, 1084 (10th Cir. 2001); *United States v. Farmer*, 73 F.3d 836, 841-42 (8th Cir.  
11 1996); *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991)). The case law upon which  
12 defendant relies is not from this circuit and discusses prosecution for Hobbs Act extortion, not  
13 Hobbs Act robbery. (ECF. No. 44). Indeed, the Ninth Circuit recently declined to “decide whether  
14 intangible property can be the subject of Hobbs Act robbery.” *See United States v. Luong*, 610 F.  
15 App’x 598, 600 (9th Cir. 2015).

16 Finally, as Magistrate Judge Ferenbach correctly stated, because the court finds that Hobbs  
17 Act robbery may be considered a crime of violence under the elements clause of 18 U.S.C. §  
18 924(c)(3)(A), the court must refrain from addressing whether the residual clause is unconstitutional  
19 under *Johnson*. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (“It is not the habit  
20 of the court to decide questions of a constitutional nature unless absolutely necessary to a decision  
21 of the case.”).

22 The court agrees with Magistrate Judge Ferenbach’s thorough analysis of the issues put  
23 forth in defendant’s motion to dismiss counts two and four. Therefore, after reviewing Magistrate  
24 Judge Ferenbach’s report, defendant’s objections, the government’s responses, and the underlying  
25 briefs de novo, the court adopts the report and recommendation in full.

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1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Magistrate Judge  
4 Ferenbach's report and recommendation (ECF. No. 33) be, and the same hereby are, ADOPTED  
5 consistent with the foregoing.

6 IT IS FURTHER ORDERED that defendant Leon Johnson's motion to dismiss (ECF. No.  
7 26) is DENIED.

8 DATED May 11, 2016.

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11 UNITED STATES DISTRICT JUDGE  
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